No. 96-117

In The

Supreme Court of the United States

October Term, 1995

CHESTER MAXWELL, GRACE MAXWELL BROWN, EWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PAISY DAVENPORT and BILL MAXWELL,

Petitioners,

vs.

SAMSON RESOURCES COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Division No. III
State Of Oklahoma

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

James A. Kee
Kee & Orange
101 Park Avenue, Suite 800
Oklahoma City, Oklahoma 73102
(405) 235-1666

Attorney for Respondent

QUESTIONS PRESENTED

1. Whether this Court will decide Constitutional issues that allegedly arise from a state court proceeding where the issues were not raised in, nor decided by, the state courts?

2. Whether a person has a property interest protected by the Due Process Clause of the Fourteenth Amendment in a claim for treble damages under a penalty statute that has been repealed before final judgment?

3. Whether any procedural due process was not afforded Petitioners?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

I. STATEMENT OF THE CASE 1

A. Facts Showing Why the Maxwells Were Not Paid Proceeds 1

B. Facts Showing the Constitutional Issues Were Not Raised Nor Passed Upon Below 4

II. THE CONSTITUTIONAL ISSUES RAISED BY PETITIONERS WERE NOT RAISED BY THE MAXWELLS NOR WERE THEY PASSED UPON BY THE OKLAHOMA COURTS 9

III. A CLAIM TO ENFORCE A STATUTORY PENALTY REPEALED PRIOR TO FINAL JUDGMENT IS NOT A PROPERTY INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT 10

IV. EVEN IF A PROTECTED PROPERTY INTEREST WERE INVOLVED, THE MAXWELLS RECEIVED PROCEDURAL DUE PROCESS ... 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

American Savings Life Ins. Co. v. Financial Affairs Management Co., Inc., 20 Ariz.App. 479, 513 P.2d 1362 (1973) 11

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 9

Bejger v. Zadadzki, 252 Mich. 14, 232 N.W. 746 (1930) 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 15

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1972) 16

Convention Center Inn, Inc. v. Dow Chemical Co., 19 Ohio Misc.2d 15, 484 N.E.2d 764 (1984) 12

Couglin v. Hilton Hotels Corp., 1995 W.L. 131845, p. 6 (D.Nev. 1995) 12

Ewell v. Daggs, 108 U.S. 143 (1883) 11

Georgia Ports Authority v. Hutchinson, 209 Ga.App. 726, 434 S.E.2d 791 (1993) 12

Gordon v. State, 608 So.2d 800 (Fla. 1992), *cert. denied*, 123 L.Ed.2d 268 11

Houck v. Hold Oil Co., 867 P.2d 451 (Okla. 1993) 14

Jeffcoat v. Highway Contractors, Inc., 508 P.2d 1083 (Okla.App. 1972) 13

Kelly v. Hall, 191 Ga. 470, 12 S.E.2d 881 (1941) 11

TABLE OF AUTHORITIES – Continued

Page

Langford v. Vanderbilt Univ., 199 Tenn. 389, 287 S.W.2d 32 (1956) 12

Mack Trucks v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993) 12

Majors v. Good, 832 P.2d 420 (Okla. 1992) 13, 14

Mattyasovsky v. West Towns Bus Co., 21 Ill.App.3d 46, 313 N.E.2d 496 (1974) 12

McConwell v. FMG of Kansas City, Inc., 861 P.2d 830, at Syllabus by the Court ¶ 10 and p. 846-47 (Kan.App. 1993) 11

Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989) 12

Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist., 464 P.2d 748 (Okla. 1969) 13

Oller v. Hicks, 441 P.2d 356 (Okla. 1967) 13

Orden v. Crawshaw Mortgage & Inv. Co., Inc., 109 Cal.App.3d 141, 167 Cal.Rptr. 62 (1980) 11

Ross v. Gore, 48 So.2d 412 (Fla. 1950) 11

Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612 (Iowa 1991) 12

Siegall v. Solomon, 19 Ill.2d 145, 166 N.E.2d 5 (1960) 12

Slocum v. Phillips Petro. Co., 678 P.2d 716 (Okla. 1983) 13

Smith v. Hill 12 Ill.2d 588, 147 N.E.2d 321 (1958) 12

Smith v. Printup, 866 P.2d 985 (Kan. 1993) 11

TABLE OF AUTHORITIES – Continued

Page

State Farm Mutual Automobile Ins. Co. v. Young, 207 Ga.App. 355, 427 S.E.2d 835 (1993) 12

Tel Service Co., Inc. v. General Capital Corp., 227 So.2d 667 (Fla. 1969) 11

Terry v. State Farm Mutual Automobile Ins. Co., 205 Ga.App. 224, 422 S.E.2d 212 (1992) 12

Texas County Irrigation and Water Resources Assoc. v. Oklahoma Water Resources Board, 803 P.2d 1119 (Okla. 1990) 13

Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364 (Okla. 1984) 12

U.S. v. MacCollum, 426 U.S. 317 (1976) 15

Vaughn v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo. 1986) 12

White v. Prenzler, 19 Ill.App.2d 231, 153 N.E.2d 477 (1958) 12

STATUTES

52 O.S.A. (1995 Supp.) §570.1, *et seq.* 10

Session Laws 1992, c. 190, §29 10

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent ("Samson") respectfully offers its Response to the Petition for Writ of Certiorari filed by Petitioners ("the Maxwells").

JURISDICTION

As explained below, the Maxwells did not raise the Constitutional issues they raise here in the Oklahoma courts nor were these issues passed upon below. To the extent this Court considers this omission jurisdictional rather than prudential, jurisdiction would be lacking.

I.

STATEMENT OF THE CASE

A. Facts Showing Why the Maxwells Were Not Paid Proceeds.

The Maxwells' Statement of the Facts make it appear as though there was never a reason why the Maxwells did not receive proceeds. Pursuant to Rule 15 of this Court, Samson offers the following to correct this misstatement of fact.

This case arose when the Maxwells claimed to own the same mineral interest in a producing gas well ("the Kinnikin well") that Kerr-McGee Corporation ("Kerr-McGee") also claimed it and its lessor ("Allen") owned. Samson operated the Kinnikin well, which is located in

Pittsburg County, Oklahoma, pursuant to a joint operating agreement ("JOA") with Kerr-McGee and others. DX 20A.

Prior to drilling the Kinnikin well, and pursuant to the terms of the JOA, Samson as operator obtained a title opinion which revealed a potential defect in the title of Kerr-McGee and Allen. DX 19A. In 1967, Allen had obtained her mineral interest by assignment from the Maxwells' brother,[1] Buster Maxwell, who in turn had acquired the mineral interest from the Maxwells' mother, Louise Maxwell. *Id.* The potential title defect was that the Maxwells' father, George S. Maxwell, had record title to the mineral interest when he died in 1960 and there was nothing in the title records showing that his title devolved to his wife, Louise. *Id.*

Samson as operator gave Kerr-McGee the title opinion and discussed with Kerr-McGee the title examiner's concern with its lease. 9/20/93 Tr., at pp. 53-58, and DX 21A. Kerr-McGee informed Samson that it was comfortable with its title and Kerr-McGee then warranted its title in the JOA. *Id.* and DX 20A.

In early September, 1985, one year and seven months after first sales from the Kinnikin well, Samson received a letter from the Maxwells' attorney at the time, Robert Ivester. DX 3A. The letter enclosed a copy of a Default Judgment dated July 5, 1985, which purported to quiet

---

[1] Not all of the Maxwells are siblings. Some are the surviving children of deceased siblings. For convenience purposes, Samson describes the Maxwell family relationships as if the Maxwells were all siblings.

title in the Maxwells to a portion of the mineral interests Mr. Maxwell owned in the Kinnikin unit at his death in 1960. DX 4A. In the default judgment proceeding, the Maxwells claimed that their father died intestate in 1960 and, therefore, that two-thirds of his property passed at his death to his children rather than to Louise. *Id.*

The Maxwells' attorney, Mr. Ivester, also authored the 1983 title opinion relating to the Kinnikin well that contained the exceptions relating to the Kerr-McGee lease and Allen's mineral interest. DX 19A. Although Mr. Ivester had actual and record notice of Kerr-McGee's purported lease covering the Maxwells' mineral interests, Kerr-McGee was *not* made a party to the default judgment proceeding. DX 4A. Also, even though Allen was a living person, she was served by publication notice in the default judgment proceeding. 9/20/93 Tr., at p. 10.

The Maxwells filed this case in March, 1987. Neither Kerr-McGee nor Allen were named in the suit. On the same day suit was filed, Kerr-McGee indicated it had not conceded that the Maxwells' title claim was valid. DX 14A. Because Kerr-McGee never agreed to the Maxwells' claim and because Kerr-McGee was never a party to a proceeding that affected its purported title, Samson as operator did not pay the Maxwells their working interest share of revenues until final judgment was entered against Samson in this case. *Id.*

The proof at the original trial did not focus upon whether Samson's conduct had been wrongful. Three of the Maxwells testified at the original one-day, non-jury trial held May 16, 1988, and their testimony spans eighteen transcript pages. 5/16/88 Transcript, at pp. 48-66.

None of the Maxwells ever indicated that they felt that Samson had withheld information or attempted to cheat them in lease discussions. *Id.* In fact, this subject came up only once, in a question posed *by Samson's attorney. Id.* at pp. 62-63. James Maxwell merely acknowledged that the lease offer had been made and that he declined it because he wanted to participate in the well. *Id.*

Following the trial, the Pittsburg County district court awarded the Maxwells over $275,000.00 in unpaid gas revenues attributable to the Maxwells' purported mineral interest and over $116,000.00 in interest and penalty interest. The district court then trebled this amount pursuant to the treble damage provision contained in 52 Okla.Stat. (1983) §547, and additionally awarded the Maxwells over $780,000.00 as a penalty. The district court judge commented that he was unsure whether Samson had intended to cheat the Maxwells, then he expressly stated that he did not have to make a finding regarding whether Samson's conduct warranted punishment before imposing the penalty.

B. Facts Showing the Constitutional Issues Were Not Raised Nor Passed Upon Below.

On appeal, Samson raised numerous arguments, including the contention that the evidence did not show wrongful conduct justifying the penalty. While the appeal was pending, the treble damage statute upon which the Maxwells' treble damage claim was based was repealed. The Oklahoma Supreme Court ultimately affirmed the award as it related to unpaid revenues and affirmed most of the award of interest and penalty interest. However,

the court reversed the treble damage award because it found that the treble damage statute required a finding of wrongdoing before treble damages could be imposed. In its opinion, the court recognized and relied in part upon the repeal of the treble damage statute. Contrary to the Maxwell's assertions here, the court indicated that its holding that fault was a necessary element of a claim for a statutory penalty was not a change of Oklahoma's prior law. The Maxwells did not petition the court for rehearing.

Following this opinion, Samson paid to the Maxwells about $600,000.00, the affirmed portion of the award and postjudgment interest. On remand, however, the Maxwells requested that the district court reinstate the treble damage award. *See*: Plaintiffs' Motion to Supplement Judgment by Entering a Finding of Wrongful Intent on the Part of Defendant Samson and Brief in Support filed 6/22/93. Samson's response included the contention that the Oklahoma Supreme Court's mandate did not contemplate further consideration of the treble damage issues. *See*: Defendant's Brief at pp. 15-16, filed 7/2/93. In their response to this contention, the Maxwells did *not* raise any Constitutional issue relating to their alleged right to continue their pursuit of the statutory penalty. *See*: Plaintiffs' Response to Defendant's Brief in Opposition to Plaintiffs' Motion to Supplement Judgment by Entering a Finding of Wrongful Intent on the Part of Defendant Samson, filed 7/6/93.[2]

---

[2] The Maxwells also did not raise any Constitutional issue in their Summary of the Issues and Argument filed in the district court on October 13, 1993. *See*: pp. 5-7 for the Maxwell's

Following remand, another one-day hearing was held before the trial judge. The Maxwells, who did not even appear for this hearing, presented only the transcript of the one-day trial held in 1988. Samson presented evidence showing that its conduct was not wrongful and, contrary to the Maxwells' contention here, that evidence was not impeached. Nevertheless, the district court found that Samson's conduct justified treble damages. The trial court then imposed a $1.1 million penalty against Samson.[3]

On appeal from this judgment, Samson raised the following issues:

1. Whether the Oklahoma Supreme Court intended for the trial court to revisit the issue of treble damages on remand.

2. Whether the Act repealing the treble damage statute applied to pending claims not yet reduced to final judgment.

3. Whether the evidence justified a penalty in the first instance.

4. Whether the trial court erred in interpreting and applying the treble damage provision as follows:

    a) As applying at all to the situation of an unleased owner who is already entitled

---

discussion concerning whether the Oklahoma Supreme Court's mandate contemplated further consideration of treble damages.

[3] The treble damage penalty increased over $350,000.00 from the first judgment because the trial court trebled post-judgment interest that ran while Samson successfully pursued its first appeal.

to share in the producing owners' net profits.

b) As requiring the trebling of all unpaid revenues, prejudgment interest and post-judgment interest, rather than the trebling of injury to "business or property" caused by specific violations of the Sweetheart Gas Bill.

c) As allowing conduct not violative of the Sweetheart Gas Bill to justify treble damages.

d) As not allowing for a month-to-month or at least period-by-period examination of whether Samson's conduct during each period was sufficiently morally reprehensible to justify punitive damages.

In its Petition in Error and Brief-in-Chief, Samson specifically argued that the Oklahoma Supreme Court's mandate following the original Appeal did not contemplate further consideration of treble damages. *See*: Petition in Error filed 8/15/94 at Exhibit "C", ¶1, and Brief-in-Chief filed 5/1/95, at pp. 19-20. In their Answer Brief, the Maxwells did not raise any Constitutional issue. *See*: Answer Brief filed 6/15/95. In fact, the Maxwells did not respond at all to Samson's contention that the Oklahoma Supreme Court's original mandate did not contemplate further consideration of treble damages. *Id.*

The Oklahoma Court of Appeals then reversed the district court's reentry of the treble damage award because it found that the Oklahoma Supreme Court's prior mandate did not contemplate further consideration of treble damages on remand. App. 2a-9c. The Oklahoma

Court of Appeals did not reach the other issues raised by Samson on appeal. In their Petition for Rehearing, the Maxwells again did not claim a Constitutional right to pursue treble damages on remand. App. 61a-67a.

The title of the sole proposition in the Petition for Rehearing, which portion of the petition has been omitted from the redacted version in the Maxwell's Appendix, was as follows: "In Remanding the Case for Further Proceeding the Oklahoma Supreme Court Acted in Accord With *the Practice* of the United States Supreme Court." *See*: Petition for Rehearing filed 11/13/95, at p. 3. (emphasis supplied). The Maxwells cited opinions from this Court wherein the Court has remanded punitive damage awards for further consideration in light of recent pronouncements by the Court. The Maxwells argued that the Oklahoma Supreme Court had followed such *a practice* in its prior opinion, not that their Due Process rights had been violated. App. 62a-67a.

Following the denial of their Petition for Rehearing, the Maxwells then sought discretionary review from the Oklahoma Supreme Court. Again, however, the Maxwells failed to raise a Constitutional issue in their Petition for Certiorari. App. 69a-88a. Instead, the Maxwells made the same argument that the Oklahoma Supreme Court had intended in its original mandate to follow *the practice* of this Court and other courts in remanding punitive damage awards for further consideration in light of recent pronouncements. *Id.* at 81a-87a. The Oklahoma Supreme Court denied discretionary review.

II.

THE CONSTITUTIONAL ISSUES RAISED BY PETITIONERS WERE NOT RAISED BY THE MAXWELLS BELOW NOR WERE THEY PASSED UPON BY THE OKLAHOMA COURTS.

Despite having had numerous opportunities to do so, Petitioners ("the Maxwells") never raised in the state court proceedings the Constitutional issues addressed in the Petition for Writ of Certiorari. Thus, neither the state district court nor the appellate courts decided the Constitutional questions that the Maxwells raise here. It is, of course, well settled that the Court will not consider Constitutional issues not raised nor passed upon in the underlying proceedings. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988).

As shown above in the Statement of the Case, the Constitutional issues raised here by the Maxwells were not raised nor passed upon below in the district court, the Oklahoma Court of Appeals or the Oklahoma Supreme Court. The Maxwells only briefly address this problem in their Petition for Writ of Certiorari, at p. 10. They contend that it was an "unexpected decision" when the Oklahoma Court of Appeals reversed the district court's reentry of treble damages because the initial appellate mandate did not contemplate further consideration of treble damages. However, as shown above, this ultimately dispositive issue was raised by Samson throughout the district court and appellate proceedings following the initial mandate. Despite having had every opportunity to raise Constitutional issues, the Maxwells simply failed to do so. The Petition for Writ of Certiorari should be summarily denied.

III.

A CLAIM TO ENFORCE A STATUTORY PENALTY REPEALED PRIOR TO FINAL JUDGMENT IS NOT A PROPERTY INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT.

The requirements of procedural due process do not apply to the deprivation of every conceivable type of property interest. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). A claimant's abstract interest in seeking a recovery is, without more, not sufficient to constitute a property interest protected by the Fourteenth Amendment. *Id.* at 577. Rather, a legitimate and enforceable claim to the recovery must exist. *Id.*

The Oklahoma Legislature repealed the treble damage provision upon which the Maxwells' claim was based before a final, non-appealable judgment was entered in this case. The Production Revenue Standards Act ("the New Act") 52 O.S.A. (1995 Supp.) §570.1, *et seq.*, which became effective September 1, 1992, did not contain a treble damage provision. *Id.*; *See also*: Session Laws 1992, c. 190, §29. The New Act, at §570.3, provided as follows:

> §570.3 Application of Act
>
> The Production Revenue Standards Act shall apply to all owners and shall apply to all producing wells, regardless of the date pooled, drilled or of the date of the underlying leases. . . .

Without question, the Oklahoma Legislature had every right to apply the repeal of the treble damage provision to pending cases. "[W]ith apparently no adjudicated exceptions," courts have held that a plaintiff has no

right to recover a statutory penalty that is repealed prior to the plaintiff obtaining a final, non-appealable judgment. *Kelly v. Hall*, 191 Ga. 470, 12 S.E.2d 881, 883 (1941).

The following is stated in *Kelly, supra*, 12 S.E.2d at 883:

> . . . Nor is there any rule of law that would preclude the legislature from abolishing a penalty before a judgment has been rendered thereon. With apparently no adjudicated exceptions, it is the rule, that, until judgment is rendered, a plaintiff has no vested right to punitive damages, and accordingly, the right to such damages may be taken away by a statute taking effect after a verdict but before judgment has been rendered thereon. (cites omitted).

Cases before and after *Kelly* have, without exception, followed the rule that a plaintiff has no vested right to recover a statutory penalty.[4]

---

[4] *Ewell v. Daggs*, 108 U.S. 143, 150 (1883) (Repeal of statute imposing usury penalty did not impair vested rights); *American Savings Life Ins. Co. v. Financial Affairs Management Co., Inc.*, 20 Ariz.App. 479, 513 P.2d 1362, 1367 (1973) (same); *Orden v. Crawshaw Mortgage & Inv. Co., Inc.*, 109 Cal.App.3d 141, 144, 167 Cal.Rptr. 62 (1980) (same); *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993) (Legislature can abolish punitive damages without infringing any Constitutional right); *McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830, at Syllabus by the Court ¶10 and p. 846-47 (Kan.App. 1993) (There is no vested right in recovering punitive damages); *Gordon v. State*, 608 So.2d 800 (Fla. 1992), *cert. denied*, 123 L.Ed.2d 268 (There is no protectable right at all in recovering punitive damages); *Tel Service Co., Inc. v. General Capital Corp.*, 227 So.2d 667, 670 (Fla. 1969) (Repeal of statutory penalty applies even if an appeal from the judgment is pending); *Ross v. Gore*, 48 So.2d 412, 414 (Fla. 1950) (There are no

The rationale of these cases is that statutory penalties are not a right of the plaintiff. A plaintiff's rights are satisfied with a recovery of compensatory damages. The penalty legislation merely grants a plaintiff a windfall that aids in the enforcement of a particular legislative policy. Because a plaintiff has no vested right to recover a statutory penalty, the legislature is free to repeal the windfall at anytime before a final, non-appealable judgment has been rendered.

Oklahoma adheres to the same principles[5] that have been universally applied by other courts to hold that a

---

vested rights to punitive damages before judgment); *Mack Trucks v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 638-39 (1993) (There are no vested or Constitutional rights to punitive damages); *State Farm Mutual Automobile Ins. Co. v. Young*, 207 Ga.App. 355, 427 S.E.2d 835, 836 (1993) (same); *Terry v. State Farm Mutual Automobile Ins. Co.*, 205 Ga.App. 224, 422 S.E.2d 212, 214 (1992) (same); *Georgia Ports Authority v. Hutchinson*, 209 Ga.App. 726, 434 S.E.2d 791 (1993) (same); *Siegall v. Solomon*, 19 Ill.2d 145, 166 N.E.2d 5, 8 (1960) (same); *Smith v. Hill* 12 Ill.2d 588, 147 N.E.2d 321, 324 (1958) (same); *Mattyasovsky v. West Towns Bus Co.*, 21 Ill.App.3d 46, 313 N.E.2d 496, 502 (1974) (same); *White v. Prenzler*, 19 Ill.App.2d 231, 153 N.E.2d 477, 480 (1958) (same); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (same); *Bejger v. Zadadzki*, 252 Mich. 14, 232 N.W. 746, 747 (1930) (same); *Vaughn v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986) (same); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 504 (Mont. 1989); *Couglin v. Hilton Hotels Corp.*, 1995 W.L. 131845, p. 6 (D.Nev. 1995) (same); *Convention Center Inn, Inc. v. Dow Chemical Co.*, 19 Ohio Misc.2d 15, 484 N.E.2d 764, 767 (1984); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32, 34 (1956) (same).

[5] Oklahoma follows the general rule that a statute which merely affects a remedy, as opposed to a right, does not affect vested rights. *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 692 P.2d 1364, 1367 (Okla. 1984). If a procedural statute is changed

litigant can no longer recover exemplary damages if a penal statute is repealed during the course of a proceeding before final judgment. Here, the Maxwells' vested rights were satisfied through their recovery of $600,000.00 in actual damages, interest and penalty interest.

In the trial court on remand, the Maxwells successfully contended that the holding of *Majors v. Good*, 832 P.2d 420 (Okla. 1992), allowed them to pursue treble damages under the repealed statute. The question

---

during the course of a proceeding, the right of the party relying on the statute "depends upon [the] statute in force at termination of [the] action, and not upon [the] statute in force at [the] commencement of [the] action." *Jeffcoat v. Highway Contractors, Inc.*, 508 P.2d 1083, 1086 (Okla.App. 1972), quoting *Igoe Brothers v. National Surety Co.*, 112 N.J.L. 243, 169 A. 841 (1934); *See also*: *Texas County Irrigation and Water Resources Assoc. v. Oklahoma Water Resources Board*, 803 P.2d 1119, 1122-23 (Okla. 1990) (No one has a vested right in the mode in which a right is enforced and, thus, even if a statute affecting the remedy is changed between judgment and appeal, the appellate court will apply the statute presently in effect). *See also*: *Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist.*, 464 P.2d 748, 756 (Okla. 1969) (No one has a vested right in how a right is enforced and statutes affecting how a right is enforced are generally applied retroactively).

The Oklahoma Supreme Court, in its first opinion in this case, recognized that treble damages are penal and are imposed for the benefit of society. 848 P.2d at 1172-73, citing *Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967). This was consistent with its prior decisions holding that exemplary damages are highly penal and are imposed for society's benefit, not the benefit of the plaintiff. *See, e.g., Slocum v. Phillips Petro. Co.*, 678 P.2d 716, 719 (Okla. 1983). In fact, the plaintiff is "whole and complete with actual damages" and has only "an incidental personal interest" in exemplary damages. *Id.*

decided in *Majors* was whether a 1986 amendment to Oklahoma's general punitive damage statute, 23 O.S. §9, should apply to an action that arose in 1984 but was tried in 1989. The Oklahoma Supreme Court held that the 1986 amendment to §9 applied prospectively only. *Id.* at 422.

The holding in *Majors*, however, did not apply to this case for two reasons. First, the Oklahoma Legislature had not provided in its 1986 amendment to §9 whether the amendment applied retroactively. Thus, unlike this case, a determination of legislature intent was required.[6] The second difference between *Majors* and this case was that *Majors* involved amended punitive provisions, not a repeal of punitive damages altogether.[7]

---

[6] *See*: *Houck v. Hold Oil Co.*, 867 P.2d 451, 457 (Okla. 1993) (" . . . [W]hether to give a statute prospective or retroactive effect should be controlled by the fundamental or transcendent canon of statutory construction, to wit: to give effect to the legislative design."). In this case, the New Act that repealed the treble damage provision expressly provided that it applied to all owners and wells regardless of when drilled. Thus, unlike in *Majors*, an interpretation of whether the Oklahoma Legislature intended for the New Act to apply, as opposed to the old law, the Legislature's express language would be applicable.

[7] In §9, the Oklahoma Legislature had merely amended how unlimited punitive damages could be recovered; it did not eliminate them altogether. Thus, no strong legislative disfavor with the concept of applying old §9 to prior cases was apparent. Here, however, in addition to the express provision applying the New Act retroactively, the total abolition of treble damages reveals a strong legislative disfavor with treble damages in cases such as this one. In fact, in its prior opinion in this case, the Oklahoma Supreme Court gave "due weight to the Legislature's recent repeal of multiple damages in cases such as this one." 848 P.2d at 1173.

The Maxwells had no property interest at all protected by the Due Process Clause of the Fourteenth Amendment in pursuing a statutory treble damage claim that was repealed prior to the Maxwells obtaining final, non-appealable judgment. Thus, the Maxwells were not entitled to procedural due process in the state court proceedings and their Petition for Writ of Certiorari should be denied.

IV.

EVEN IF A PROTECTED PROPERTY INTEREST WERE INVOLVED, THE MAXWELLS RECEIVED PROCEDURAL DUE PROCESS.

The Maxwells have a difficult time defining what procedures mandated by due process they were denied. The Maxwells point to no Oklahoma law or court rule relating to appeals in general or to proceedings on remand that would violate due process on its face. Instead, the Maxwells apparently argue that, as applied in this case, Oklahoma's appellate procedures violated the Maxwells' procedural due process rights.

The concept that due process requires an opportunity to pursue a claim on remand from an appeal is novel. Because the Due Process Clause does not even require that an initial appeal right be given to a litigant, it is difficult to imagine that it would require a remand right. *U.S. v. MacCollum*, 426 U.S. 317, 323 (1976). At any rate, it is apparent that the Maxwells in fact received procedural due process on remand.

Procedural due process guaranties the opportunity to be heard, not a favorable decision. *Boddie v. Connecticut*,

401 U.S. 371,\378 (1971); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1972). An erroneous decision on a question of state law does not support a due process claim. *Brinkerhoff-Faris*, 281 U.S. at 680. A due process claim does not arise even if a court " . . . has overruled principles or doctrines established by previous decisions upon which a party relied. . . . " *Id.*

The Maxwells received every opportunity, and exercised all but two of them, to be heard upon the question of whether the Oklahoma Supreme Court's initial opinion contemplated further consideration of treble damages under the repealed statute on remand. Although they did not do so, following the initial opinion, the Maxwells could have petitioned the Oklahoma Supreme Court for rehearing to clarify this issue. *See*: Rule 29, Rules of the Supreme Court of Oklahoma.

On remand, the Maxwells successfully argued to the district court that they were entitled to proceed on remand. Although they did not do so, in the briefing of the second appeal, the Maxwells should have responded to the argument contained in Samson's Brief-in-Chief that the initial mandate did not contemplate further consideration of treble damages on remand. Following the Oklahoma Court of Appeals' opinion adverse to the Maxwells on this issue, the Maxwells did exercise their right to be heard on this issue by filing a petition for rehearing and a petition for certiorari in the Oklahoma appellate courts.

The Maxwells incorrectly claim that the Oklahoma Supreme Court changed prior law in its first opinion when it found that fault was a requisite element of the statutory treble damage claim. While the contention

seems irrelevant to the due process analysis, it is not correct in any event. As the Oklahoma Supreme Court itself discussed in its original opinion in this case, Oklahoma law had long required a finding of fault to support the imposition of a statutory penalty.

The Maxwells' reliance on cases from this Court which have remanded punitive damages for further consideration in light of recent pronouncements is misplaced. First, the remands are made for prudential reasons; they are not Constitutionally required. Second, there is obviously a vast difference between the appellate review required before a civil fine can be upheld and the review required before a civil fine can be reduced or reversed. A defendant appealing the imposition of a significant civil penalty has a definite property interest demanding due process protection. On the other hand, as universally noted by the courts, an individual plaintiff has little interest in the windfall obtained by the recovery of a statutory penalty. *See*: cases cited, *supra*, notes 4 and 5.

It is clear that the Maxwells received every opportunity to be heard. The Maxwells are in reality complaining of what they perceive as an incorrect decision by the Oklahoma appellate courts, not a denial of an opportunity to be heard. Because the Due Process Clause does not protect against the alleged misapplication of state law, the Petition for Writ of Certiorari should be denied.